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United States Courts
Southern District of Texas
FILED

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THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Anna Feldman Vertkin, M.D.,
Maria Socorro Ruiz Guevara, R.N.

Plaintiffs,

vs.
Wells Fargo NA, Its Subsidiaries And
Assignees, et al.

Defendants.

-) Case No: H-10-1433
-) Defendants Michael Vertkin's
Sonja Vertkin's and Gene Vertkin's
-) **Memorandum of Points and Authorities**
-) **IN SUPPORT OF MOTION TO DISMISS FOR**
-) **LACK OF LEGAL STANDING**
-) **LACK OF JURISDICTION OVER THE SUBJECT MATTER,**
-) **IMPROPER VENUE, RES JUDICATA, COLLATERAL**
-) **ESTOPPEL**
-) **FAILURE TO STATE A CLAIM UPON WHICH RELIEF**
-) **COULD BE GRANTED AND INSUFFICIENCY OF SERVICE**
-) **OF PROCESS**
-) **FRCiv.P 12(b)(1), 12(b)(3), 12(b)(6),**
-) **FRCiv.P 12(b)(5) Fed. R. Civ. P. 41(d)**

-) **Complaint Filed:** April 28, 2010
-) Motion hearing date and time : to be set by
-) the Court

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

MOTION TO DISMISS FOR LACK OF LEGAL STANDING, LACK OF JURISDICTION OVER A SUBJECT
MATTER, IMPROPER VENUE AND FORUM NON CONVENIENCE, RES JUDICATA, COLLATERAL
ESTOPPEL, FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED, INSUFFICIENCY OF
SERVICE OF PROCESS

INTRODUCTION AND BACKGROUND

Defendants would like to apologize to this Court for inartful motion to follow.

None of us are lawyers, and Michael and Gene Vertkin, while citizens of USA for 32 years, not native English speakers. Considering our financial circumstances, we have no chose, but to write this motion ourselves.

Plaintiff Anna Vertkin (hereafter, Anna) and defendant Michael Vertkin (hereafter, Michael) were married for more than 30 (thirty) years. On September 26, 2006 Michael filed petition for marriage dissolution. Now, almost 4(four) years later, marriage dissolution is final, but property division is not, pending trial in Superior Court of State of California for the County of Marin (hereafter, Marin Court), Case No FL 064242.

At the time of separation Anna was and still is, in control of hundreds of thousands of dollars of the community funds. Exact amounts are not known, since she never provided accounting. She was in possession of family residence at 160 Rose Avenue, Mill Valley, California (hereafter House); the main point of controversy in the instant complaint. Estimated equity of the House, at the time of separation, was between \$850,000 and \$1,200,000. In secret, Anna transferred all the equity line on the House to the Fidelity Investment Funds, which were a community property, but under Anna's control. On October 26, 2006, just few weeks after she was served with ATRO in marriage dissolution , Anna traveled to Switzerland and transferred all of the Fidelity positions to her secret Swiss bank Account with Credit Agricole (Suisse) SA, Geneva (see ¶ 9, Michael Vertkin's declaration, thereafter Michael's Dlr.).

After returning from Switzerland in November of 2006, Anna used extreme delay tactics in the marriage dissolution case. Anna brought numerous petitions and motions; all of

1 them were denied or dismissed by the Marin Court. Anna used 7(seven) different law firms in
 2 the divorce case, acting as her own attorney in interim. In total, she filed 10 (ten) attorney
 3 substitution forms in the marriage dissolution case. Anna filed TRO against Michael, with some
 4 incredible accusations ranging from "leaving a loaded gun on her pillow" to mail theft and
 5 animal abuse. After almost a year of delay in prosecuting TRO, it was dismissed with prejudice.
 6 Unhappy with the family court rulings, Anna filed petition to dismiss presiding family court
 7 Judge Hon. Verna Adams. It was denied by independent judicial review for lack of grounds for
 8 dismissal.

9 In August of 2007, Anna filed lawsuit against Michael in United States District
 10 Court for Northern District of California, San Francisco Division, and Case No3:07-cv -04471-
 11 SC, she accused Michael, among other things, in intercepting her electronic communications and
 12 stealing her patient's files. By the time lawsuit was filed, Michael had to act as his own attorney.
 13 Anna's needless delays and harassment in the divorce proceedings left Michael out of funds and
 14 deeply in debt. In spite of Michael's *pro se* status, all of Anna's allegations were dismissed in
 15 April of 2010; only remaining issue in the case is Michael's counterclaim. Anna now is suing
 16 attorney representing her in that case in the United States Bankruptcy Court for Northern District
 17 of California.

18 In November 2007, House suffered fire damage; just few months after Anna, in
 19 secret and in violation of ATRO, removed Michael from the part of the insurance on the House.
 20 James Goldberg, Annals boyfriend, represented himself to the State Farm Insurance Co, as
 21 owner representative in the House reconstruction. It was done without permission from Michael,
 22 an equal co-owner of the House; James Goldberg received insurance money from the State Farm
 23 Insurance Co. Anna deposited insurance checks issued in the name of Michael and Anna Vertkin
 24 to Swiss Bank Accounts; Michael's signatures on the checks were **forged**. Anna transferred to
 25 the third party all the community possessions from the House, appraised by State Farm Insurance
 26 Co. in excess of \$450,000. After Hose reconstruction, Anna and Goldberg leased House for 10
 27 years to the non existent company, incorporated in Panama. Subsequently, lease was found
 28 sham, null and void by the Bankruptcy Court. Lease payments form subtenants were collected by

1 Anna's boyfriend, James Goldberg and deposited in his personal account. James Goldberg did
 2 not pay House mortgage, taxes or insurance.

3 At the mandatory divorce settlement conference in April of 2008, Anna
 4 threatened Michael and his divorce attorney RG Long (Long) (an unserved defendant in the
 5 instant case) to file for bankruptcy, if Anna's proposal in the divorce settlement was not
 6 accepted. Trial for property division in marriage dissolution was scheduled for November, 2008
 7 in Marin Court. On October 16, 2008, Anna filed voluntary Chapter 7 bankruptcy petition with
 8 United States Bankruptcy Court for Northern District of California, Santa Rosa Division Case
 9 No 08-12189(¶3Exh.B, Michael's Dlr.). Anna's Bankruptcy petition stayed divorce proceedings.
 10 In addition to filing bankruptcy for herself, Anna forged Michael's name, as a co-debtor on the
 11 bankruptcy petition. Michael had to appeal to bankruptcy court to remove himself from Anna's
 12 bankruptcy filing. At present Michael is a creditor in Anna's bankruptcy case (¶3, Michael's
 13 Dlr.). According to the court appointed Trustee, Anna violated every duty of the debtor: she
 14 never set foot in the Bankruptcy Court, in spite of being ordered to appear by the Bankruptcy
 15 judge, she did not submit accounting, she did not show up for mandatory examination by the
 16 Trustee. When Trustee petition the court to deny Anna's bankruptcy discharge, Anna filed
 17 Adversary Proceedings, Case AP 09-1003, against Trustee and some other individuals, including
 18 Michael. Case was dismissed by the Bankruptcy Judge. Unwilling to accept the outcome, Anna
 19 filed another AP # 10-04032, this time she sued not only Trustee and Michael, but a bankruptcy
 20 Judge, and two of her former attorneys, and majority of the defendants in an instant case. The
 21 AP# 10-04032 case has almost all the defendants and all of the allegations, as an instant case; in
 22 addition Anna accused bankruptcy Judge of treason and suggests that Trustee was involved in
 23 the past in a conspiracy to commit murder. Anna tried to withdraw AP# 10-04032 to the District
 24 Court in San Francisco; her motion to withdraw was denied on June 15, 2010 by the District
 25 Court Judge. Now, AP# 10-04032 is again in front of the Bankruptcy Court. The Bankruptcy
 26 Case is still pending. Unwilling to wait for her bankruptcy resolution or AP case outcome, Anna,
 27 now joined by Michael's brother's ex-wife, Maria Socorro Ruiz Guevara (thereafter, Guevara),
 28 brought this instant lawsuit to Texas. This time in her effort to hurt Michael, Anna and Guevara

1 went after Michael's family, and named among the defendants Michael's brother Gene Vertkin
 2 (hereafter, Gene) and sister in law Sonja Vertkin (hereafter, Sonja).

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6 **ARGUMENT AND AUTHORITIES**

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9 **I. LACK OF STANDING**

10 FRCiv.P. 12(b)(1), 12(b)(6)

11 Anna has no standing in instant complaint; this lawsuit should be dismissed, as to all
 12 Anna's claims against Michael, Gene and Sonja. Anna has no legal right to file civil lawsuit,
 13 outside the bankruptcy proceedings, without approval of the Bankruptcy Court and appointed
 14 Trustee. Ninth Circuit Court holds that a motion to dismiss for failure to state claim under Rule
 15 12(b) (6) lies where the complaint reveals on its face that Plaintiff lacks standing. [Sacks v. Office
16 of Foreign Assets Control (9th Cir. 2006) 466 F3d 764,771; Holly Sugar Corp. v. Goshen County
17 Co-op Beet Growers Ass'n (10th Cir. 1984) 725 F2d 564,567-568]

18 On October 16, 2008 Anna Vertkin filed voluntary Chapter 7 bankruptcy petition in the
 19 United States Bankruptcy Court for Northern District of California, Santa Rosa Division, case
 20 No 08-12189 (see ¶ 3, Michael's Dlr.). The Bankruptcy Case is still pending. There is almost to
 21 180 (hundred and eighty) entries on the docket in the bankruptcy proceedings. In addition, there
 22 are hundreds of docket entries in the Adversary Proceedings (hereafter, AP), within the
 23 bankruptcy case. AP's are filed by both; Anna and the court appointed Trustee, administering
 24 Anna's Bankruptcy Case (see ¶3 **exhibit B** and ¶7 **exhibit A**, Michael's Dlr.). Upon filing for
 25 bankruptcy Anna's standing was transferred to a court appointed Trustee In re Eisen, 31 F.3d
 26 1447, 1451 n.2 (9th Cir.1994). Only serving Trustee, and not debtor, has standing concerning
 27 property of the estate. Michael is a creditor in Anna Vertkin's bankruptcy case (see ¶ 3,
 28 Michael's Dlr.).

Financial rights arising prepetition against Michael, Gene or Sonja regarding the House, any rights for damages or sanctions are transferred to the Trustee. Anna is, or should be, well aware of her standing, since she already tried to sue multitude of opponents, including Michael, in the United States District Court for Northern District of California and 9th Circuit Appeals Court (see ¶ 7, and **Exh.A**, Michael’s Dlr.). All of Anna’s lawsuits were dismissed or referred back to the Bankruptcy Court. At the time of this writing, Anna was pleading with United States District Court for Northern District of California “motion for withdrawal of reference” from the Bankruptcy Court, Case No C-10-00775 RS, the only lawsuit listed on the Plaintiffs’ petition, as related to the instant complaint. Bankruptcy Trustee and Michael, among others, were opposing withdrawal of reference. Hearing for the “withdrawal” motion was set for July 17th, 2010, but it was denied by the Court on June 15th, 2010 on a written argument. Guevara was made aware of Anna’s lack of standing with this Court by a certified letter (see ¶ 6, 7, Michael’s Dlr.).

In order to commence a lawsuit outside of the Bankruptcy Court debtor has to follow very specific procedure prescribed by the Bankruptcy law: (a) send an application, in writing, to the bankruptcy Trustee assigned to the case, requesting permission to proceed with the lawsuit. Such application shall contain merits of the proposed action and assurance that the debtor and the estate will not incur any expenses in perusing such lawsuit; (b) obtain agreement from the bankruptcy Trustee to pursue a lawsuit, provided that lawsuit has merits and will not burden the estate: (c) file a motion with the bankruptcy court, describing proposed lawsuit and verifying that the bankruptcy Trustee supports debtor's desire to pursue the case; (d) serve such motion on **all** of the creditors of the estate, allowing time for objections; (e) obtain bankruptcy court approval of the motion. **None** of the above process was followed by the Plaintiffs, prior to initiation of this lawsuit against Gene and Sonja (see ¶ 5, Michael's Dlr.) or Michael (see ¶ 4, Michael's Dlr.). To initiate a lawsuit against Michael, a creditor in Anna's bankruptcy, debtor (Anna) had to follow all the above procedures; in addition the lawsuit must be an Adversary Proceeding within the bankruptcy case and there is no right to a jury.

Anna's Bankruptcy filing, a month prior to the community property division trial, protected her for the last two years, from facing consequences of her violation of the Court

1 orders and California law in the marriage dissolution case No FL 064242. In effect, Anna seeks
 2 all the protections of the Bankruptcy Court and none of the responsibilities attached to it.

3 By filing this lawsuit Anna, and collaterally Guevara, violated the Bankruptcy law and
 4 violated Michael's rights to object within the Bankruptcy Court. Guevara, by interjecting herself
 5 in this case, interfered with the administration of Anna's bankruptcy estate and is subject to
 6 penalties of the Bankruptcy Court.

7 Defendants Michael Vertkin, Sonja Vertkin and Gene Vertkin plead with this Court to
 8 dismiss aforesaid lawsuit with prejudice under FRCiv.P. 12 (b)(1) and 12(b) (6) for lack of
 9 standing. In alternative, if court finds Guevara still has standing with this court, name Anna
 10 Vertkin should be stricken from the list of plaintiffs, and all the claims associated with Anna
 11 Vertkin to be removed and stricken from the pleadings.

12

13 **II. LACK OF JURISDICTION OVER THE SUBJECT MATTER**

14 FRCiv.P. 12(b)(1) 28 USC 1391

15 This Court has authority to dismiss this claim for lack of subject matter jurisdiction
 16 Plaintiffs' claim of jurisdiction, based on the diversity of the citizenship, does not
 17 withstand scrutiny of allegations asserted in the complaint. Page 7, ¶ 15 of the complaint states
 18 that "First Plaintiff in this action resides in Harris County, Texas..." page 6, ¶ 9 and ¶ 10 of the
 19 complaint states that defendants Gene and Sonja reside in Tarrant County, Texas. Plaintiff Anna
 20 Vertkin and defendants Gene and Sonja Vertkin are citizens of the state of Texas. In order to
 21 claim jurisdiction under 28 USC § 1332(a)(1), which is one of prerequisites for an exclusive
 22 federal jurisdiction, there has to be **complete** (emphasis added) diversity of citizenship between
 23 **all** of the plaintiffs and **all** of the defendants, not a single defendant and plaintiff could be of the
 24 same citizenship. Article III, § 2 of the Constitution of the United States gives federal courts
 25 jurisdiction over "controversies between citizens of different states", which in the instant case
 26 does not exist. Plaintiffs' as a party invoking federal diversity jurisdiction bears the burden of
 27 proving the requisite of complete diversity of citizenship, "the court may still insist that the
 28 jurisdictional facts be established by a preponderance of evidence," [McNutt v. General Motors

1 Accept. Corp of Indiana (1936) 298 US 178,189, 56 S.Ct. 780, 785.] Therefore, diversity
 2 jurisdiction claim falls away on the basis of plaintiffs' original pleading.

3 Defendants could not find any federal question in the allegations of the complaint against
 4 Gene or Sonja. The only possible allegation offered against Gene, is simple "garden variety"
 5 fraud or forgery. Gene denies any and all such allegations, but even if *arguendo* it were true,
 6 complaint can be herd by a Superior Court of competent jurisdiction.

7 Allegations, if any, against Sonja are entirely unclear form the complaint. The only
 8 allegation, which could be possibly inferred from the original pleading, is that Sonja traveled
 9 with Gene to California, while Gene was still married to Guevara. Plaintiffs could not possibly
 10 infer that it rises to the level of federal question, or any actionable event whatsoever. Plaintiffs'
 11 have no grounds for a complaint against Sonja in **any** court; it is especially true within the
 12 jurisdiction of the District Court. If it pleases this court, it may well notice that Gene and
 13 Guevara were separated at the time of an event. Guevara should be sanctioned for bringing,
 14 vengeful, nonexistent, domestic grievance, occurred in Florida 15 years ago, to the District Court
 15 in Texas. As a consequence, Guevara is polluting the court system in the great state of Texas
 16 with foreign, meritless and frivolous allegations.

17 Forum shopping is not a proper way to establish a jurisdiction. Remarkably, in their
 18 complaint Anna and Guevara acknowledge that they are shopping for a Court. In the complaint
 19 on p.21, ¶ 85, they state that they are pleading with this Court, because no Court in California
 20 will accept complaint against current or former relatives. This sort of forum shopping is
 21 offensive and just stops short of "Court wanted" ad in a newspaper. The plaintiffs' statement is
 22 also factually incorrect; Courts in California did accept Anna's complaints against Michael and
 23 most of the other defendants in this Case, but rejected all of Anna's arguments, and dismissed or
 24 sent back to Bankruptcy Court all of Anna's claims. (¶7, Michael's Dlr.).

25 Court jurisdiction must be shown affirmatively by the plaintiffs. This Court may
 26 consider evidence outside the plaintiffs' pleadings to evaluate the validity of the jurisdictional
 27 claim "when the question to be considered the one involving the jurisdiction of a federal court,
 28 jurisdiction must be shown affirmatively, and that showing is not made by drawing from the
 pleadings inferences favorable to the party asserting it" Sipping Fin'l Services Corp. v. Dracos

(2nd Cir. 1998) 140 F3d 129,131. Because this Court's power to hear the case is at stake, it is not limited considering the allegations of the complaint. It may consider extrinsic evidence; and if evidence is disputed, it may weigh the evidence and determine the facts in order to satisfy itself as to its power to hear the case:" The existence of disputed material facts will not prevent the trial court from evaluating for itself the merits of jurisdictional claims" *Roberts v. Corrothers* (9th Cir. 1987) 812 F2d 1173, 1177. There wealth of extrinsic evidence available in this case.

On March 7, 2010, Anna filed "Motion to Joint Defendants" in United States District Court for Northern District of California, San Francisco (USDCSF), Case: No3:07-cv -04471-SC, Anna Vertkin v. Michael Vertkin, arguing that USDCSF is a proper jurisdiction for the case (¶11, pp. 4, 5, **Exhibit C**, Michael's Dlr.). Anna was ordered by presiding judge to show cause, why her case should not be dismissed. On May 6, 2010, Anna Vertkin filed "Notice and Motion to Dismiss" her case, arguing that "Additional federal torts, another victim and injurers were discovered and are now in front of the **United States District Court in Texas**"(an instant case, emphasis added), (¶12, p. 1 **Exhibit D**, Michael's Dlr.). Obviously, plaintiffs' assume that the jurisdiction is transposable. They are wrong, the Federal Court jurisdiction not transferable or interchangeable at the whim of the plaintiffs, it has to be established affirmatively. In another example: Michael and R.G. Long (Michael's divorce attorney), the defendants in an instant case, among the multitude of others, were sued by Anna in an Adversary Proceedings AP 09-1003 (within Bankruptcy Case No 08-12189), with many "facts" of the instant complaint. At the time Anna argued that bankruptcy court was a proper jurisdiction. Anna's lawsuit was dismissed with prejudice, order entered on March 13, 2009(¶14, **Exhibit F**, Michael's Dlr.). When Anna lost the case, she changed her mind about jurisdiction and filed the motion to withdraw reference to the District Court in Northern California, the motion was herd by Judge Jeffrey S. White, Case 09-00701 JSW, and denied by order entered on August 11, 2009 (¶13, **Exhibit E**, Michael's Dlr.). After two years in the bankruptcy court system, Anna and Guevara know or should have known that the only proper court for Anna's prepetition claims is the Bankruptcy Court for Northern District of California. Anna's claims could only be filed with the approval of the court appointed Trustee, and yet Anna, and now Guevara, keep on bringing repetitive, lawsuits with similar allegations without authorization. It is certainty that the Trustee would not approve an instant

1 lawsuit. Trustee already filed Motion to Deny Anna's "Motion to Withdraw Reference" in the
 2 lawsuit with the similar "facts" against some of the same defendants in the District Court in
 3 Northern California (¶15, **Exhibit G**, Michael's Dlr.) and Anna's motion was denied (¶13,
 4 **Exhibit E**, Michael's Dlr.) "a district court should consider the efficient use of judicial
 5 resources, delay and cost to the parties, uniformity of bankruptcy administration, the prevention
 6 of forum shopping , and other related factors" *FTC v. First Alliance Mortgage Company (In re*
 7 *First Alliance Mortgage Company)*, 282 B.R. 894, 901-902 (C.D. Cal. 2001).

8 Given all the facts stated above, defendants Michael Vertkin, Gene Vertkin and Sonja
 9 Vertkin plead with this honorable Court to dismiss aforesaid complaint, with prejudice and
 10 without leave to amend for lack of jurisdiction over the subject matter FRCiv.P. 12(b)(1),
 11 28 USC 1391

12

13 **III. IMPROPER VENUE AND FORUM NON CONVENIENCE**

14 FRCiv.P. 12 (b)(1), 12(b)(3), 12(b)(6),28 USC 1391

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16 This chapter of memorandum establishes grounds for dismissal of the plaintiffs'
 17 complaint on the grounds of improper venue and forum *non convenience*. Plaintiffs did not, and
 18 could not establish venue provisions for their complaint in the United States District Court for
 19 Southern District of Texas. This complaint should be dismissed pursuant of FRCiv.P 12(b)(3)
 20 and 28 USC § 1406 (a) because, plaintiffs failed to allege any basis whatsoever to satisfy their
 21 burden of establishing that the venue is proper in this Court. Plaintiffs have the "obligation to
 22 institute the action in the permissible forum" and thus bear "the burden that venue is proper", *in*
 23 *re to Freeman v. Fallin*, 254 F. Supp. 2d 52, 56 (D.D.C 2003). Here, in their complaint plaintiffs
 24 did not state provisions of USC they rely upon to establish the venue for the selected forum.

25 Plaintiffs' justification for the selection of this venue is based on ¶14, p. 7 of the
 26 complaint, where they state that "Office of controller of currency is located in Houston and
 27 involved in an investigation of various parties named in this action". Plaintiffs did not inform us
 28 how it is related to this specific case. We assume that by "various parties" plaintiffs mean

1 companies named in the complaint, not Michael, Gene or Sonja. Nevertheless, if we take
 2 plaintiffs argument to its logical absurd conclusion; any and all lawsuit nationwide against
 3 companies, named in this action, should be in this Court. Another hint of venue claim in the text
 4 of plaintiffs' complaint consists of mysterious, but incomprehensible line 6 p.13: "Texas, who
 5 remained unresponsive". That is it. Plaintiffs even did not enlighten us what was the question to
 6 Texas. These defendants doubt that this establishes a minimum contact with the forum state.

7 Federal venue rules are based on 28 USC 1391. In instant case Section 1391(a) does not
 8 apply, since it applies to diversity cases. Defendants made *prima facie* showing, as discussed in
 9 part II Lack of Jurisdiction of this motion that no complete diversity exists in this case. The only
 10 possible venue claim plaintiffs could have, is in a federal question. According to 28 USC
 11 1391(b), the venue in a federal question cases, is proper: (a) where any defendant resides, if **all**
 12 defendants reside in the same state; (b) where a **substantial part of events occurred or**
 13 **property located** (emphasis added) ; (c) in a district which any defendant may be found, in no
 14 **other** district exists where there is venue. Plaintiffs' selection of the venue *prima facie* fails all of
 15 these conditions (a) none of the defendants reside in Southern district of Texas and defendants
 16 are citizens of different states; (b) none of the alleged events occur in Texas and property of the
 17 controversy, the House, located in Mill Valley, California, some 2000 mi away from Houston,
 18 Texas; (c) proper venue exists just seventeen miles form the property, in San Francisco; the
 19 United States District Court for Northern District of California. Just a month ago Anna tried,
 20 unsuccessfully, to withdraw case to that court; the Bankruptcy Court: Case No 08-12189, AP #
 21 10-04032, with the same allegations, and majority of the same defendants, as in the instant case.
 22 Motion to withdraw to USDCSF, Case No C-10-00775, is the only "related" case plaintiffs refer
 23 to in instant complaint. Anna's motion was denied on June 15, 2010.

24 There no relationship between allegations of the complaint and the forum state. No part
 25 of the events or omissions giving rise to the complaint occurred in Texas. All the events
 26 described in the complaint occurred in California, all allegedly injurious acts occurred in
 27 California. Plaintiffs, without specific references, allege that defendants violated "California
 28 law".

1 This Court is not only improper venue for the complaint; it is also forum *non conveniens*,
 2 under the common law. There are no public or private interests' factors in trying this case in
 3 Texas.

4 Private interests in forum, as defined under the common law, are (a) access to the sources
 5 of proof; (b) availability of compulsory process to compel attendance of witnesses;
 6 (c) convenience of voluntary witnesses; (d) difference in substantive law to be applied in
 7 unfamiliar forum. None of the described factors are convenient to be tried in Texas: (a) all of the
 8 sources of proof are in California; (b) witnesses from California will have to be hauled 2,000 mi
 9 across the country to testify about such matters, foreign to Texas, as California construction
 10 Codes and Mill Valley local building permit process, etc., (c) it is highly unlikely, that any
 11 witnesses, at a great expense of money and time, voluntarily come forward to testify in Texas
 12 Court; (d) Michael, having worked in construction design industry for quarter of a century, both
 13 in Texas and California, can testify that the laws , especially construction laws and building
 14 permit laws, are vastly different between those two states.

15 Public interests in forum, as defined under the common law, are (a) local interest in
 16 having disputes resolved locally; (b) court congestion ; (c) familiarity with the law; (d) jury duty
 17 burden on citizens in a jurisdiction having no contact with the dispute. This lawsuit serves no
 18 public interests of citizens of Texas. This law suit will only encumber public with the dispute
 19 foreign to Texas. Texas has no stake, but burden in prosecuting this lawsuit.

20 Plaintiffs filed complaint without alleging any plausible basis for venue in this Court.
 21 Moreover, because this lawsuit cannot rest on the diversity jurisdiction, and because all alleged
 22 events or omissions giving rise to the plaintiffs' claims could not possibly have occurred in
 23 Texas, no discovery is needed before this Court dismisses plaintiffs' complaint. See Mwani v.
24 Bin Laden, 417 F3d 1, 17 (D.C. Cir. 2005)(upholding a denial of jurisdiction-related discovery
 25 because the court could "not see what facts additional discovery could produce that would affect
 26 jurisdictional analysis") (internal quotation marks and citation omitted). In addition plaintiffs'
 27 lawsuit is in forum *non conveniens*, for both defendants and citizens of Texas.
 28

1 This court should dismiss the complaint on the basis of improper venue and forum *non*
 2 *conveniens* under FRCiv.P. 12 (b)(1), 12(b)(3), 12(b)(6) 28 USC 1391

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5 **IV. RES JUDICATA, COLLATERAL ESTOPPEL**

6 Fed.R.Civ.P. 12(b)(6), Fed.R.Civ.P.. 41(d)

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9 This chapter of memorandum establishes grounds for dismissal of the plaintiffs'
 10 complaint on the grounds of *Res Judicata* and Collateral Estoppel.

11 On January 14, 2003 Anna filed a lawsuit, an Adversary Proceedings, in the United
 12 States Bankruptcy Court for Northern District of California, Santa Rosa Division Case **AP 09-**
 13 **1003** (within bankruptcy case 08-12189, chapter 7)(¶ 16, **Exhibit H**, Michael's Dlr.). The
 14 lawsuit was dismissed with prejudice by bankruptcy judge Alan Jaroslovsky on March 13, 2009
 15 (¶ 14, **Exhibit F**, Michael's Dlr.). Anna filed motion to "Withdraw Reference" of the dismissed
 16 case to the United States District Court for Northern California Case No. C-09-00701, her
 17 motion was denied (¶ 15, **Exhibit G**, Michael's Dlr.), Anna filed motion for reconsideration with
 18 the same court; the motion was denied again (¶ 13, **Exhibit E**, Michael's Dlr.).

19 Case **AP 09-1003** had many of the same "facts" as instant case, all of the same causes of
 20 action and some of the same defendants. The 72 (seventy two) page complaint, Case **AP 09-1003**
 21 (¶ 16, **Exhibit H**, Michael's Dlr.) (hereafter AP), is somewhat disorganized and difficult to
 22 follow, as to accepted form of statement of fact. Instead of prescribed causes of action, AP had
 23 31(thirty one) "claims of relief". In aggregate, the complaint had the same facts and claims, as
 24 the complaint in front of this Court, and it was dismissed with prejudice and should not be
 25 litigated again," when a court of competent jurisdiction has entered a final judgment on the
 26 merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only
 27 as to every matter which was offered and received to sustain or defeat the claim or demand, but
 28 as to any other admissible matter which might have been offered for that purpose", Cromwell v.
County of Sac., 94 U.S. 351, 352 (1876).

1 In this case, as in AP, Anna's and Guevara's allegations arise from liability creating
2 event involving the house located at 160 Rose Ave. in Mill Valley, California (House). If we
3 examine adjudicated AP complaint (¶ 16, **Exhibit H**, Michael's Dlr.) we find "facts" very much
4 like in this complaint : Anna asserts that the House was abandoned (p.25), that there was
5 legitimate lease on the House, but was interfered with , by the Trustee and Michael's divorce
6 attorney RG Long (Long). She insists, without any justification, that House was "hers" (p. 31,
7 32) (now, in instant complaint, it is Anna's and Guevara's). She accuses Michael, Trustee and
8 Long in conspiracy to sell "her" House to subtenant (p.33) and insists that constitutes RICO Title
9 42 U.S. Code violation. Anna accuses Long in illegal charging lean (p.38) which constitutes also
10 violation of RICO act. Anna alleges that there was vermin damage to the House, caused by
11 Michael and accuses Michael of being suspect in the causing the fire to the House, while Long
12 attempting to liquidate the House (p. 35). She accuses everybody, including Trustee, in secret,
13 but yet unknown to her, dealings, bribery, embezzlement and self serving enrichment (p.34). She
14 states that Trustee collects rent on the House, but not paying the mortgage (p.39). She accuses
15 Michael, Long and Trustee in "retrieving" property from Anna's estate, argues that Trustee has
16 secret arrangement to sell the House to cash in on Long's illegal lean (p.40). Anna repeats her
17 allegation that Michael abandoned the property in uninhabitable conditions (yet she continued to
18 live there), and there was multiple severe construction defects, caused by Michal negligence (she
19 just realized that after living in the House for 12 years) (p.43). Anna again, in repetition, accuses
20 Michael of arson, but this time she adds new charge; conspiracy to commit murder and she
21 splices it up by assertion, that death by fire was continues theme in couples 30 years marriage,
22 and that Michael "promised" the fire (p.44). Anna accuses Michael in refusing to pay mortgages,
23 insurance and maintenance on the House (back on earth, Anna was ordered by Marin Court to
24 pay all House expenses on two occasions and order is still standing) (p.45). She repeats her
25 allegations that Michael and Long insisted on selling the House, but now she accuses Michael
26 and Long in interfering in House reconstruction after the fire, and illegal seizure of the funds
27 (p.46). Further, Anna insists that Michael is not entitled to "any of real property cause or
28 improvements caused by" Anna and property is not sellable and lease is necessary to avoid
bankruptcy (p.47). Anna declares that she "should have allowed property (House)... go into

1 foreclosure, rather than to continue heroic efforts to save this property" (p.48). Anna further
 2 continues in a repetitive manner assert that Michael left property, the House, in "ruined, infested
 3 condition, a disaster", but this time she added that Michael did not paid taxes, on some kind of
 4 secreted earnings (p.53). She asserts that community funds were used for community property
 5 and again asserting that she had to do plumbing, repairs and install lights (p 56). And finally, she
 6 declares "shame and disgrace on this court" and declares that she will not obey the laws of the
 7 bankruptcy court (p.57). It is apparent that "facts" of the AP case are very similar, if not as
 8 organized, as in instant complaint. Anna and Guevara added few defendants, including Michael's
 9 brother Gene and sister in law Sonja and added some new theory of recovery, but main point of
 10 contention is the House and events surrounding its foreclosure. "merely adding some facts,
 11 naming additional defendants or proposing a different theory of recovery will not convert one
 12 cause of action into a second cause of action if both actions involve the same liability-creating
 13 conduct"; Walworth Co. v. United Steelworkers of America, 443 F. Supp. 349, 351 (W.D. Pa.
1978);

15 The Claim Preclusion or *Res Judicata* doctrine is the legal doctrine designed to preserve
 16 judicial resources, to promote finality and closure, and encourage reliance on adjudication by
 17 preventing inconsistent results in different court proceedings. There are four prerequisites for *Res*
18 Judicata (Claim Preclusion): (a)Final judgment in first action is entered;(b)First judgment must
 19 be on merits ;(c)Parties are the same; (d)It applies to any claim that was brought or could have
 20 been brought arising out of the same transaction or occurrence. There is the final Judgment in the
 21 AP case; it was dismissed with prejudice, the Judgment was on merits; it went through several
 22 courts with the same results, upholding bankruptcy court decision. Main parties in the case were
 23 the same. "[u]nder *res judicata*, a final judgment on the merits of an action precludes the parties
 24 or their privies from relitigating issues that were or could have been raised in that action";
25 *Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719 (1948).* It is impossible to
 26 determine where AP case ends and instant case begins, because majority of the liability creating
 27 events are the same. It is difficult for Michael, Gene and Sonja to determine from instant
 28 complaint, which causes of action directed at them. All "new" allegations existed at the time of
 AP and could have, and should have been raised at that time "when a court of competent

1 jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit
 2 and their privies are thereafter bound 'not only as to every matter which was offered and received
 3 to sustain or defeat the claim or demand, but as to any other admissible matter which might have
 4 been offered for that purpose", *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876).

5 Defendants Michael, Gene and Sonja maintain that the causes of action in instant case are
 6 the same, as in AP case, but even *arguendo* if they are different; they are precluded from being
 7 litigated by the principle of Collateral Estoppel or Issue Preclusion. "once a court has decided an
 8 issue of fact or law necessary to its judgment, that decision ... preclude[s] relitigation of the issue
 9 in a suit on a different cause of action involving a party to the first case." *San Remo Hotel v. San*
 10 *Francisco*, 545 U.S. 323 (2005), fn. 16. Collateral Estoppel prevents both plaintiffs from
 11 relitigating lawsuit, where issue was already decided, i.e. Guevara is bound by principle of non
 12 mutual Collateral Estoppel, not to bring adjudicated issue to the Court. It is not necessary to have
 13 mutuality to apply issue preclusion *See In re: Bernhard v. Bank of America* 19 Cal.2d 807, 122
 14 P.2d 892 (1942). In addition, Guevara has further restriction to participate in the claim against
 15 Gene; see "Final judgment of dissolution of Marriage" (¶ 3, **Exhibit A**, p.7 ¶ 25, 26 Gene
 16 Vertkin's Declaration.) it reads "Each party releases the other from all claims, demands due,
 17 debts, rights or **causes of action** (emphasis added) up to the date of this Agreement". Guevara
 18 relinquished rights for causes of action against Gene by signing the agreement. By bringing this
 19 complaint in this court, Anna and Guevara knew, or should have known that they are violating
 20 Fed. R. Civ. P. 41(d), which reads:"If a plaintiff who has once dismissed an action in any court
 21 commences an action based upon or including the same claim against the same defendant, the
 22 court may make such order for the payment of costs of the action previously dismissed as it may
 23 deem proper and may stay the proceedings in the action until the plaintiff has complied with the
 24 order".

25 Both, Anna and Guevara are precluded from raising issues and claims of this complaint.
 26 This court should dismiss this complaint with prejudice on the basis of *Res Judicata* and
 27 Collateral Estoppel in accordance with FRCiv.P. 12(b)(6) and Fed. R. Civ. P. 41(d),
 28

V. FAILURE TO STATE THE CLAIM UPON WHICH RELIEF COULD BE GRANTED

FRCiv.P. 12(b)(6)

The court has authority to dismiss this suit for failure to state the claim upon which relief could be granted if the complaint clearly demonstrates that the plaintiffs cannot prove any set of facts which entitle it to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73,104 S.Ct. 2229, 2232 (1984); *Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401-02 (5th Cir. 1996)

Michael, Gene and Sonja have no ideas which of the stated Causes of Action are directed at them. Anna and Guevara had not given a hint, in the complaint, which specific laws or statutes Michael, Gene or Sonja violated. It is not defendants' burden to guess what they accused of. Defendants deny the "facts" of the complain directed at them, but even if true, the allegations do not give rise to any actionable events against Michael, Gene or Sonja. Even if plaintiffs prove each of the allegations, plaintiffs have not set forth the essential elements necessary to state a claim upon which relief can be granted. Courts need not "swallow the plaintiff's inventive hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *[Aulson v. Blanchard (1st Cir. 1996) 83 F3d 1, 3]*

Plaintiffs have attempted to state eight Causes of action. First, violation of the RICO act. Section 1962(b) makes it unlawful for a person to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Plaintiffs did not and cannot allege of this first basic concept of the statue could be used against Michael, Gene or Sonja (¶10, Michael's Dlr., ¶ 2 Gene's Dlr.). Therefore, even if plaintiffs prove all the facts alleged in the complaint, they cannot prove the elements necessary to state a claim for RICO statue.

Second, violation of the Due Process Clause under Fifth Amendment of United States Constitution. Fifth amendment reads :"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

1 deprived of life, liberty, or property, without due process of law; nor shall private property be
 2 taken for public use, without just compensation". How this is relates to any stated allegations
 3 against Michael, Gene or Sonja is a mystery to these defendants. Therefore, even if plaintiffs
 4 prove all the facts alleged in the complaint, they cannot prove the elements necessary to state a
 5 claim Due process violation against Michael, Gene or Sonja.

6 Third, is fraud, including forgery, construction fraud, conspiracy to defraud. Plaintiffs did
 7 not allege any facts that would constitute fraud, including forgery, construction fraud, and
 8 conspiracy to defraud. Therefore, even if plaintiffs prove all the facts alleged in the complaint,
 9 they cannot prove the elements necessary to state a claim of fraud, including forgery,
 10 construction fraud, and conspiracy to defraud against Michael, Gene or Sonja.

11 Forth, unfair business practices. Plaintiffs did not allege any facts that would constitute
 12 business relations between plaintiffs Anna and Guevara on one side and Michael, Gene or Sonja
 13 on other. Therefore, even if plaintiffs prove all the facts alleged in the complaint, they cannot
 14 prove the elements necessary to state a claim of unfair business practices against Michael, Gene
 15 or Sonja.

16 Fifth, torturous interference with the contract, Torturous inducement of breach of
 17 contract. Unlawful Detainer of the Property. Plaintiffs did not allege any facts that would
 18 constitute that Michael, Gene or Sonja interfered with the contract, Torturous inducement of the
 19 breach of contract or unlawful detainer of property. Therefore, even if plaintiffs prove all the
 20 facts alleged in the complaint, they cannot prove the elements necessary to state a claim for
 21 torturous inducement of the breach of contract or unlawful detainer of property against Michael,
 22 Gene or Sonja. It should be noticed that plaintiffs alleged contract (lease) was found sham, null
 23 and void by the Bankruptcy Court. Anna leased Hose for 10 years (not a year as she and Guevara
 24 alleged in their statement of fact) to the fake Panamanian Corporation which did not have
 25 address or phone number. Anna's boyfriend, Jim Goldberg was collecting rent from the tenants
 26 and depositing money to his private bank account, without paying property's mortgages,
 27 insurance or taxes. That was the **real** reason for the House foreclosure.

1 Six, Intentional torts of waste, Trespass, conversion, Intentional infliction of the Severe
 2 Emotional distress, Restraint of Trade. Plaintiffs did not allege any facts that would constitute
 3 that Michael, Gene or Sonja committed Intentional torts of waste, Trespass, conversion,
 4 Intentional infliction of the Severe Emotional distress or Restraint of Trade. Therefore, even if
 5 plaintiffs prove all the facts alleged in the complaint, they cannot prove the elements necessary to
 6 state a claim for Intentional torts of waste, Trespass, conversion, Intentional infliction of the
 7 Severe Emotional distress or Restraint of Trade against Michael, Gene or Sonja.

8 Seven, Illegal foreclosure and Illegal foreclosure auction, intentional and general
 9 negligence, breach of the fiduciary duty. Plaintiffs did not allege any facts that would constitute
 10 that Michael, Gene or Sonja committed an Illegal foreclosure and Illegal foreclosure auction,
 11 intentional and general negligence, breach of the fiduciary duty. Therefore, even if plaintiffs
 12 prove all the facts alleged in the complaint, they cannot prove the elements necessary to state a
 13 claim for Illegal foreclosure and Illegal foreclosure auction, intentional and general negligence,
 14 breach of the fiduciary duty against Michael, Gene or Sonja.

15 Eights, Retaliation. Plaintiffs did not allege any facts that would constitute that Michael,
 16 Gene or Sonja committed any retaliation. Therefore, even if plaintiffs prove all the facts alleged
 17 in the complaint, they cannot prove the elements necessary to state a claim of retaliation against
 18 Michael, Gene or Sonja. The court need not accept as true conclusionary allegations or legal
 19 characterizations. Nor need it accept *unreasonable* inferences or unwarranted deductions of fact.

20 /In re Delorean Motor Co. (6th Cir. 1993) 991 F2d 1236, 1240;

21 Even, if plaintiffs prove all the facts alleged in the complaint, they cannot prove the
 22 elements necessary to state any claim for which relief could be granted against Michael, Gene
 23 or Sonja. This court should dismiss the complaint on the basis Failure to State a Claim upon
 24 which relief could be granted, under FRCiv.P. 12(b)(6)

27 **VI. INSUFFICIENCY OF SERVICE OF PROCESS (AS TO MICHAEL VERTKIN)**

28 FR Civ. P. 12(b)(5)

1 At the time of this writing Michael Vertkin has not been served with aforesaid complaint
 2 (¶ 2, Michael's Dlr.). Anna was informed by Michael in e-mail, dated June 1, 2010, that he has
 3 not been served with the complaint and voluntarily provided his current mailing address. There
 4 was no answer to e-mail and no service. Anna made it a habit to sue Michael without ever
 5 serving him. This lawsuit is the latest example. Wherefore, lawsuit has to be dismissed for
 6 insufficiency of service of process, under FR Civ. P. 12(b)(5)

7

8 **CONCLUSION**

9

10 After reviewing this complaint Michael, Gene and Sonja have no doubts, that this lawsuit
 11 is presented for no other purpose, than to harass, cause unnecessary delay, and needlessly
 12 increase the cost of litigation. Anna and Guevara are well aware, of Anna's lack of standing with
 13 this court, since Anna already attempted to withdraw similar lawsuit to the District court and was
 14 denied withdrawal. In addition, complain, mirroring this, is right now in front of the Bankruptcy
 15 Court in Northern California. Plaintiffs did not attempt to serve Michael. Even if Michael
 16 mailing address was changed within last few months, Anna knows Michael's e-mail address and
 17 phone number, but never attempted a contact. Michael voluntarily e-mailed Anna his address on
 18 June 1, 2010, but still wasn't served. Nether Anna or Guevara, collaborated with Michael's
 19 efforts to confer, as prescribed by LR 7 of this Court. Anna and Guevara tried to mislead this
 20 Court by not listing all the related cases (¶ 6, ¶ 7 Michael's Dlr.). Plaintiffs did not make a
 21 minimum attempt to declare which of the causes of action directed at these defendants.

22 For almost four years, Anna Vertkin made it a habit, to sue Michael Vertkin in
 23 groundless, overlapping, repetitive complaints. In addition to the lawsuits, she filed numerous
 24 false reports with the police, Justice Department, Attorney General, FBI, and FINRA, and with
 25 some other government agencies Michael has never heard about. Now, she fashioned an "ex-
 26 wife club", by joining Ms. Maria Socorro Ruiz Guevara and added Michael's Family to her "to
 27 be sued" list. California Courts, understandably, are reluctant to declare *pro se* litigants a
 28 vexatious litigant. In this case, she "messed with Texas" and Texas citizens, after reviewing

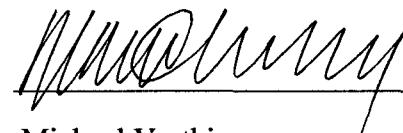
1 Anna's "suing body of work" this court could and should declare Anna, for what she really
2 become, a vexatious litigant.

3 The combination of the flaws makes this complaint unique candidate for the dismissal
4 with prejudice and without leave to transfer or amend. This complaint does not deserve a second
5 chance in *any* Court.

6
7 WHEREFORE Defendants, Michael Vertkin, Gene Vertkin and Sonja Vertkin move this
8 Honorable Court:

- 9 1. Enter an Order dismissing the complaint with prejudice, without leave to amend.
- 10 2. Declare Anna Vertkin a vexatious litigant
- 11 3. Sanction Anna Vertkin under Rule Fed. R. Civ. P. 41(d)
- 12 4. Order Plaintiffs to pay Defendants' costs and expenses to attend to this complaint and this
13 motion.
- 14 5. Order Maria Socorro Ruiz Guevara, to pay penalties, as this court deem just and proper
15 for interfering with the bankruptcy administration.
- 16 6. Grant such other and further relief as Court may deem reasonable and just under the
17 circumstances.

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24 Respectfully submitted, June 23, 2010

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Michael Vertkin